## CITATIONS

### CASES


| | PAGE |
|---|---|
| Atherton Mills v. Johnston, 259 U. S. 13 | 4 |
| Berry v. Davis, 242 U. S. 468 | 4 |
| Board of Public Utility Commissioners v. Compania General De Tabacos De Filipinas, 249 U. S. 425 | 4 |
| Brotherhood of Locomotive Firemen and Enginemen v. Toledo, Peoria & W. R. R., 332 U. S. 748 | 4 |
| Brownlow v. Schwartz, 261 U. S. 216 | 4 |
| Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co., 25 F. Supp. 322 (Del. 1938) | 3 |
| Colonial Oil Co. v. American Oil Co., 3 F. R. D. 29 (E. D. S. C. 1943) | 3 |
| Delahanty v. Newark Morning Ledger Co., 26 F. Supp. 327 (N. J. 1939) | 3 |
| Electrical Corp. v. Thomas Co., 307 U. S. 241 | 4 |
| Federal Savings & Loan Ins. Corp. v. First National Bank, 4 F. R. D. 313 (W. D. Mo. 1945) | 3 |
| Federal Trade Commission v. Goodyear Co., 304 U. S. 257 | 9 |
| Fishgold v. Sullivan Corp., 328 U. S. 275 | 4 |
| Hamilton Watch Co. v. Hamilton Chain Co., 43 F. Supp. 85 (R. I. 1942) | 3 |
| Henjes v. Aetna Ins. Co., et al., 39 F. Supp. 418 (E. D. N. Y. 1941) | 3 |
| Leonard & Leonard v. Earle, 279 U. S. 392 | 8 |
| McGrain v. Daugherty, 273 U. S. 135 | 9 |
| Merrimack River Sav. Bk. v. Clay Center, 219 U. S. 527 | 2 |
| Montgomery Ward & Co. v. United States, 326 U. S. 690 | 4 |

PAGE

Southern Pacific Co. v. Interstate Comm. Comm., 219 U. S. 433 ..... 8

Southern Pac. Terminal Co. v. Interstate Comm. Comm., 219 U. S. 498 ..... 8, 9

St. Pierre v. United States, 319 U. S. 41 ..... 7

United States v. Anchor Coal Co., 279 U. S. 812 ..... 4

United States v. Freight Assn., 166 U. S. 290 ..... 8, 10

United States v. Mine Workers, 330 U. S. 258 ..... 2, 11

STATUTES AND MISCELLANEOUS

Federal Rules of Civil Procedure, Rule 41(a) ..... 3

Norris-LaGuardia Act (29 U. S. C. 101 *et seq.*) ..... 10, 11

War Labor Disputes Act (50 U. S. C. App. 1501-1511).. 11

In The

# Supreme Court of the United States

October Term, 1949

No. 182

Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and Switchmen's Union of North America,
*Petitioners,*

v.

United States of America

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition is almost completely silent concerning the important issues on the merits which petitioners seek to have reviewed. Respondent argues instead that, "notwithstanding the possible importance of the questions which the petition attempts to have this Court

decide" (Br. in Opp. 6), certiorari should not be granted for the alleged reasons that: (1) Petitioners have no standing to attack the judgment of the Court of Appeals because that judgment, which vacated the injunction and directed dismissal of the complaint on the ground of mootness, gives petitioners the full relief they would obtain through reversal on the merits by this Court; (2) the Court of Appeals was correct in holding the controversy moot; and (3) the basic question respecting the right to enjoin strikes has been decided heretofore in the *Mine Workers* case. We shall reply to these untenable contentions in the same order below.

## I.

In its first argument respondent says in effect that petitioners are not entitled to review *no matter how wrong the Court of Appeals may have been on the mootness question and no matter how important that issue and the additional issues on the merits may be.* There are at least two answers to this argument.

(1) Respondent's assertion that petitioners cannot secure greater relief through reversal on the merits is simply not correct. It is true, of course, that the judgment below ordered vacation of the injunction and dismissal of the complaint.[1] But that is by no means the extent of the relief petitioners would obtain by reversal on the merits.

---

[1] In several places in its brief in opposition respondent states that the injunction has already been vacated. While the matter is of no significance here, that is actually not the case. The judgment of the Court of Appeals did say that the order of the district court was vacated, but the mandate of the Court of Appeals has been stayed pending review here. The judgment of the Court of Appeals does not of course become effective until its mandate issues and the trial court enters judgment accordingly. *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527. Consequently, the permanent injunction remains in existence and will continue to do so until final disposition of the case by this Court.

The specious nature of respondent's argument becomes apparent upon full analysis of the circumstances. It was respondent which sued for an injunction in the district court. Petitioners — who were defendants in the trial court — of course asked for no affirmative relief. As defendants there, they sought to have the complaint dismissed *on the merits. Such a dismissal would operate as res judicata and estoppel by judgment.* Petitioners sought the same relief in the Court of Appeals and ask for the same relief here. The judgment of the Court of Appeals, however, denies a judgment on the merits and therefore deprives petitioners of the protections of res judicata and estoppel by judgment. The present judgment has the same effect as a dismissal *without prejudice.*

Obviously such a dismissal without prejudice at this late stage is prejudicial to petitioners. Rule 41(a) of the Federal Rules of Civil Procedure provides that, after a case is at issue, plaintiff cannot dismiss except by stipulation or "upon order of the court and upon such terms and conditions as the court deems proper." And the federal courts have uniformly held that, with the progress of litigation, the defendant acquires a right to decision and the plaintiff loses the right to dismissal without prejudice. *Cincinnati Traction Bldg. Co.* v. *Pullman-Standard Car Mfg. Co.*, 25 F. Supp. 322 (Del. 1938); *Delahanty* v. *Newark Morning Ledger Co.*, 26 F. Supp. 327 (N. J. 1939); *Henjes* v. *Aetna Ins. Co. et al.*, 39 F. Supp. 418 (E. D. N. Y. 1941), affirmed 132 F. 2d 715 (C. C. A. 2); *Hamilton Watch Co.* v. *Hamilton Chain Co.*, 43 F. Supp. 85 (R. I. 1942); *Colonial Oil Co.* v. *American Oil Co.*, 3 F. R. D. 29 (E. D. S. C. 1943), affirmed 130 F. 2d 72 (C. C. A. 4), certiorari denied 317 U. S. 679; *Federal Savings & Loan Ins. Corp.* v. *First National Bank*, 4 F. R. D. 313 (W. D. Mo. 1945), affirmed 148 F. 2d 731 (C. C. A. 8).

The purpose of this rule respecting dismissals without prejudice is to protect the defendant from harassment.

Any other rule would permit a plaintiff to sue and dismiss at will, even until the defendant is penniless or worn out. Once a defendant has expended money and effort in defense of a suit, he acquires a right to a final adjudication which will put an end to such litigation through operation of the doctrine of res judicata or estoppel by judgment. It is that right which the judgment of the Court of Appeals denies petitioners. Clearly, therefore, if the decision of the Court of Appeals on mootness is wrong (as must be assumed for the purpose of this first argument of respondent), petitioners have been prejudiced by the ruling and are entitled to review to protect their right to an authoritative and final judgment on the merits.

(2) Respondent's argument also leads to discriminatory and irrational results. The judgment entered by the Court of Appeals is a form of judgment following as a matter of course after a holding of mootness.[2] The situation here is that (a) plaintiff secured a judgment on the merits in the trial court, which respondent says we may assume is errone-

---

[2] Actually, the judgment deviates somewhat from what appears to be established practice. The correct procedure in such cases seems to be to reverse — rather than vacate — the judgment and remand the cause with instructions to dismiss the complaint. *Berry* v. *Davis*, 242 U. S. 468; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218; *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Board of Public Utility Commissioners* v. *Compania General De Tabacos De Filipinas*, 249 U. S. 425; but see *Brotherhood of Locomotive Firemen and Enginemen* v. *Toledo, Peoria & W. R. R.*, 332 U. S. 748; *Montgomery Ward & Co.* v. *United States*, 326 U. S. 690. The obvious reason for reversal is to dispose of the injunction and at the same time eliminate the question of res judicata and estoppel by judgment. It might be suggested that vacating (as distinguished from reversing) the judgment, while it wipes out the injunction, may permit the judgment to stand as res judicata. We think it clear, however, that no court would make such a technical distinction but, if the question should be raised, would hold that under the circumstances the judgment of the district court is not res judicata against petitioners on the merits. If that is not the case, then clearly this Court should grant certiorari under several precedents squarely in point. *Electrical Corp.* v. *Thomas Co.*, 307 U. S. 241; *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 281-283.

ous,(b)defendants appealed,(c)the Court of Appeals did not reach the merits but held the case to be moot on grounds which respondent says we may also assume to be erroneous, and(d)the defendants in the trial court, as petitioners here, seek review of the mootness issue in this Court in order to obtain appellate review of the merits. Respondent's position on the other hand is that, notwithstanding a wrong judgment of the trial court against the defendants on the merits, another wrong judgment on appeal to the effect that the case is moot automatically forecloses petitioners' right to seek review here on certiorari (Br. in Opp. 6-7). This is so, according to respondent, on the alleged ground that the ruling of mootness (and consequent vacation of the injunction and dismissal of the complaint) gives petitioners all the relief that can be afforded them in any event (id. 7).

But, in addition to the reason given above in point (1) of this reply brief, that result is absurd. If *plaintiff* had lost on the issue of mootness, of course no one could maintain that *it* was not entitled to seek review of that issue here on certiorari. But, according to respondent, when plaintiff wins on its assertion of mootness, defendants cannot have review here even though they are the losers on the mootness issue in the Court of Appeals. Respondent's argument has a like effect insofar as review on the merits is concerned. It would mean that if plaintiff lost on mootness and the merits, it could have review of both in this Court; but if plaintiff is able to persuade the Court of Appeals that the case has become moot, defendants are foreclosed from having the merits reviewed by any court, no matter how erroneous the ruling on mootness may be. We believe the appellate process embodies no such discrimination. Respondent cites no authority to support its novel view.

Moreover, the effect of respondent's argument would be that, if *on defendants' motion* the Court of Appeals holds the case moot, plaintiff would be entitled to seek review here; but where, as here, the holding of mootness is *on*

*plaintiff's motion,* defendants are not to be permitted review on certiorari. In other words, according to respondent, the availability of review on certiorari would depend upon which side makes the successful contention of mootness in the intermediate court *even though the question and the ruling of that court are precisely the same in both instances.* Thus the right to certiorari would not depend on the importance of the issues or the correctness of the decision regarding mootness, but on whether plaintiff or defendants made the successful motion. We believe the right to review on certiorari hinges on no such tenuous distinction.

These irrational inconsistencies, we believe, make the true situation apparent. The point is that respondent here raised the issue of mootness in the intermediate appellate court. Petitioners there contended that the case was not moot and that they were entitled to a final adjudication and reversal on the merits. But, instead, the Court of Appeals held the case to be moot. Since they lost and thereby were denied a final adjudication on the merits, to which they have a right if the case is not moot, petitioners are entitled to seek review here.

II.

Respondent next asserts that, in any event, the Court of Appeals' holding on mootness is correct. We think this argument is equally without merit.

The petition points out that the decision on mootness is of great public importance because it requires petitioners and other unions in like circumstances to refuse to settle labor disputes for the extended period necessary to secure authoritative review (Pet. 11-13). It also points out the great importance of the questions raised on the merits (Pet. 16, 17-35). Respondent nowhere denies the importance of either the mootness question or the questions on the merits, but on the contrary admits that those questions may be important (Br. in Opp. 6).

The petition also demonstrates that the decision on mootness is erroneous for several reasons: (1) There is a real probability of renewed controversy, as witnessed by the fact, among others, that the Government has seized the railroads of the nation three times in less than five years to settle railway labor controversies (Pet. 13). (2) Matters of great public importance are involved (Pet. 14). (3) The settlement was involuntary because it was forced upon petitioners by an injunction which denied them their lawful economic bargaining power (Pet. 15). (4) The district court decision will have a most serious influence and effect on all future collective bargaining between petitioners and the railroads, since it holds that a nation-wide strike by petitioners is unlawful and thereby deprives petitioners of rights necessary to enable them to exercise liberty of contract in bargaining with the carriers (Pet. 15). (5) Since petitioners must obey any anti-strike injunction and cannot long resist settlement when thus deprived of their lawful bargaining power, the practical effect of the ruling of the Court of Appeals is to foreclose petitioners forever from securing authoritative review on the question of their right to strike (Pet. 11-12, 16).

In general, respondent does not deny these facts. Respondent asserts only that, even though these things are true, the case is moot as a matter of law. This technical argument is rested upon the contention that the verbally separate and particular strike call which gave rise to the controversy is gone. Respondent also proceeds to argue that, since that strike threat no longer exists, "the controversy" must be dead and that it makes no difference that in substance the same controversy will recur. We sharply disagree with this legal conclusion, and believe that the decided cases unequivocally support our view.

The only case respondent cites for its contention that the probability of renewed controversy does not save a case from mootness is *St. Pierre* v. *United States*, 319 U. S. 41,

which is clearly inapplicable. There the court held the case moot because petitioner had already served the contempt sentence which he asked to have reviewed and because (1) he could have sought a stay and review of the judgment by the Supreme Court before serving the sentence and (2) in the event of another contempt he could similarly obtain Supreme Court review prior to serving his sentence. The Court distinguished *Southern Pac. Terminal Co.* v. *Interstate Comm. Comm.*, 219 U. S. 498, on the foregoing two grounds. They are clearly not present here. In the present case petitioners obviously must obey any future injunction issued by the district court, could not have any such injunction stayed pending review, and compliance with such injunction will compel settlement of the dispute before there can be review by this Court.

The many decisions of this Court holding that a case is not moot where there is a fair possibility of renewed controversy are cited at pages 13-14 of the petition. Respondent seeks to distinguish those cases by saying that in all of them the injunction had continuing effect in the same controversy or the acts sought to be restrained continued until the time of ultimate decision (Br. in Opp. 10). But just the opposite is true. In *Southern Pac. Terminal Co.* v. *Interstate Comm. Comm.*, 219 U. S. 498, and *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, the orders which the appellants sought to enjoin had by their own terms expired three and eight months, respectively, before decision by this Court. Obviously the judgments of this Court could have been effective only with respect to possible new controversies over future orders of like nature. In *United States* v. *Freight Assn.*, 166 U. S. 290, the association attacked by the Government had been dissolved before the case was heard by this Court. In *Leonard & Leonard* v. *Earle*, 279 U. S. 392, the year for which appellants sought a license had expired and the judgment of this Court could have had effect only as to new applications for other li-

censes for ensuing years. In *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, the discriminatory practice complained of by the Commission had been discontinued and the contracts giving rise to the discrimination had been canceled, yet the Court said "discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot" (p. 260).

Respondent seeks to distinguish the leading case of *Southern Pac. Terminal Co.* v. *Interstate Comm. Comm.*, *supra*, by referring to a statement of the Court that the Commission's order might to some extent be the basis of further proceedings (Br. in Opp. 9-10). In making that statement, the Court expressly disclaimed the effect respondent here seeks for it. The Court there said: "But there is a broader consideration" (219 U. S. at p. 515). That broader consideration, the Court said, consisted of the facts that the order might be repeated, review might be defeated, and matters of public interest were involved (id.). Respondent also says that the Commission's order there was in effect a continuing one, even though its stated time limit had expired (Br. in Opp. 10). That also is incorrect. The order was not a continuing one and the Court did not suggest that it was. On the contrary, the Court pointed out that the "questions involved" in the order were continuing, as of course are the questions on the merits in the case at bar. Respondent's efforts to avoid the controlling effect of this decision are fully answered by the opinion in *McGrain* v. *Daugherty*, 273 U. S. 135, 182, where this Court itself interpreted the *Southern Pac. Terminal Co.* case to hold "that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the commission and was a matter of public interest." Since in the case at bar the controversy is capable of repetition and is a matter of public interest — as respondent does not deny — the *Southern Pac. Terminal Co.* case is directly in point.

Respondent also attempts to distinguish *United States* v. *Freight Assn., supra,* by saying that the illegal association conduct there sought to be enjoined not only was capable of repetition but had already been repeated. It is true the Court mentioned a showing by the Government that, after dissolution of the association, most of the same defendants had again entered into a substantially similar agreement to remain in force for a specified time. But a full reading of the opinion makes it clear the Court referred to that fact only to demonstrate the possibility of repetition, and the real ground of decision was that there was a chance of renewed controversy in matters of public interest.

Respondent cites a long list of cases for the proposition that a court will not proceed to adjudication where there is no subject-matter on which its judgment can operate (Br. in Opp. 8-9). That general principle has no application here, however. The decisions of this Court demonstrate conclusively that there is a subject-matter on which its judgment can operate where the possibility of renewed controversy exists, questions of public interest are present, and the circumstances are such that parties might be deprived of their rights without ever securing authoritative review. The case at bar clearly meets those requirements.

Respondent says "it is proper to assume" that when the next such situation arises petitioners can secure review before being compelled to settle the dispute (Br. in Opp. 11). That assumption is entirely unwarranted and contrary to fact. It has always been recognized that anti-strike injunctions almost immediately force the workers into settlement by depriving them of their economic bargaining power while taking nothing away from the employers. That was the fundamental reason for the enactment of the Norris-LaGuardia Act depriving the federal courts of jurisdiction to issue injunctions of any duration in such matters. Since there is no possibility of securing a stay of such an injunction pending review and since the injunc-

tion necessarily forces the employees into early settlement, the practical effect of the decision below is to foreclose petitioners from securing review. And, even if that were not true, the effect of the ruling would be to require petitioners to refuse to settle their disputes with the carriers for the many months necessary to secure ultimate review, a result which would seem to be inconsistent with the public interest.

III.

Respondent finally asserts that "the general question of importance, namely, the right to enjoin strikes in industries seized * * * by the United States" has been decided in *United States* v. *Mine Workers,* 330 U. S. 258 (Br. in Opp. 11). But we have shown in our petition that the question here as to the applicability of the Norris-LaGuardia Act is vastly different from that in the *Mine Workers* case (Pet. 17-22). Moreover, the petition demonstrates that two questions of great importance not decided in the *Mine Workers* case are raised here. Those new questions are (1) whether the threatened peaceful strike was lawful and therefore not subject to injunction and (2) whether the Executive Branch of the Government has any "right of action" to invoke equity to protect interstate commerce and the mails in the absence of an act of Congress creating that right, particularly when Congress has in several statutes consistently denied that right. In the *Mine Workers* case this Court decided only the question of jurisdiction under the Norris-LaGuardia Act. The Court did not rule on the merits of the injunction or on the Executive Branch's right of action. Moreover, the strike there was unlawful under the War Labor Disputes Act and the Government was suing for breach of its own contract with the miners (Pet. 26, 33). Consequently, it is wholly inaccurate to say that the questions raised here have been decided in the *Mine Workers* case.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CARL MCFARLAND
ASHLEY SELLERS
KENNETH L. KIMBLE

1302 18th St. N. W.
Washington 6, D. C.

*Counsel for Petitioners*

September 1949